

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

CANYON PARK BUSINESS CENTER
OWNERS' ASSOCIATION,

Petitioner,

v.

CITY OF BOTHELL,

Respondent.

Case No. 21-3-0006

FINAL DECISION AND ORDER

SYNOPSIS

Canyon Park Business Center Owners' Association (CPBCOA, Petitioner) challenged City of Bothell's (City) adoption of ordinances amending its comprehensive plan and replacing a subarea plan concerning adequacy of its Environment Impact Statement (EIS), consistency with the City's LOS standards for transportation and policing, public participation, and alleged that the City acted in an arbitrary and discriminatory manner with regard to public property. The Board concluded Petitioner did not show that the City's action failed to comply with GMA or SEPA.

I. INTRODUCTION

Petitioner challenges the adoption of Ordinance No. 2340, Ordinance No. 2341, and Ordinance No. 2342. Ordinance No. 2340 "amend[ed] the City's Comprehensive Plan and repealed and replaced the existing Canyon Park Subarea Plan (Subarea Plan)."¹ Ordinance No. 2341 "adopt[ed] development regulations to implement the Subarea Plan."² Ordinance

¹ Petition for Review (PFR, Feb. 16, 2021).

² *Id.* at 2.

1 No. 2342 “establish[ed] planned action for the Canyon Park Subarea pursuant to [SEPA].”³
2 All the Ordinances “were adopted by the City Council on December 15, 2020 and published
3 on December 18, 2020.”⁴

4 Procedural history of the case is detailed in Appendix A. All legal issues as
5 established in the Prehearing Order are set out in Appendix B.
6

7 **II. BOARD JURISDICTION**

8 The Board finds the Petition for Review was timely filed⁵ and that Petitioner has
9 standing to appear before the Board.⁶ The Board also finds it has jurisdiction to review the
10 issues stated in the complaint for compliance with the Growth Management Act (GMA).⁷

11 Regarding SEPA standing, the Eastern, Western, and Central Puget Sound regions
12 have read RCW 36.70A.280(1)(a) and (2)(b) as allowing person(s) who have participated in
13 the legislative process leading up to the challenged action to allege failure to comply with
14 Chapter 43.21C as it relates to plans, development regulations, or amendments adopted
15 under RCW 36.70A.040. The Petitioner did participate in the City’s process,⁸ thus the Board
16 finds that they also have SEPA standing.
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19 **III. STANDARD OF REVIEW**

20 Comprehensive plans and development regulations, and amendments to them, are
21 presumed valid upon adoption.⁹ This presumption creates a high threshold for challengers
22 as the burden is on the petitioner to demonstrate that any action taken by the City fails to
23 comply with the GMA.¹⁰ The Board is charged with adjudicating GMA compliance and,
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27 ³ *Id.*

28 ⁴ *Id.* at 3.

29 ⁵ RCW 36.70A.290(2).

30 ⁶ RCW 36.70A.280(2).

31 ⁷ RCW 36.70A.280(1).

32 ⁸ Petitioner’s Prehearing Brief at 14 “Petitioner submitted TENW’s analysis to the City in written comments and at public hearing”; Exhibit 130.

⁹ RCW 36.70A.320(1).

¹⁰ RCW 36.70A.320(2).

1 when necessary, invalidating noncompliant plans and development regulations.¹¹

2 The scope of the Board's review is limited to determining whether a City has
3 achieved compliance with the GMA only with respect to those issues presented in a timely
4 petition for review.¹² The Board is directed to find compliance unless it determines that the
5 challenged action is clearly erroneous in view of the entire record before the Board and in
6 light of the goals and requirements of the GMA.¹³
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8 IV. PRELIMINARY MATTERS 9

10 The City argues that certain arguments in the Petitioner's Brief should be struck as
11 being based on evidence the Board did not allow to be added to the record.¹⁴

12 In addition, the City argues that Petitioner has abandoned several issues listed in the
13 PFR. Specifically, the City argues that Petitioner did not brief issues 1,3, and 9 and that
14 "[those] arguments have been waived and should be deemed abandoned."¹⁵ Further, the
15 City argues that Petitioner did not completely address the issues, including leaving out
16 portions of legal discussion and citation, instead making "mere conclusory statements."¹⁶
17 The City notes that Section C of the Petitioner's prehearing brief only argues issue 6,
18 therefore, "Issues 4, 5, 7, and 8 have been abandoned."¹⁷
19

20 **The Board finds** that issues 1, 3, and 9 were not briefed and are abandoned in their
21 entirety. Many allegations of noncompliance in the remaining issue statements were
22 inadequately briefed. Additionally, the parties' briefs were not organized by discreet issues
23 statements. Thus, the Board organizes its discussion and analysis of the *remaining*
24 *challenges* briefed by the Petitioner under three key topics.
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27 ¹¹ RCW 36.70A.280, RCW 36.70A.302.

28 ¹² RCW 36.70A.290(1).

29 ¹³ RCW 36.70A.320(3). In order to find the County's action clearly erroneous, the Board must be "left with the
30 firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201
(1993).

31 ¹⁴ City's Prehearing Brief at 10.

32 ¹⁵ *Id.* at 11.

¹⁶ *Id.*

¹⁷ *Id.* at 32.

1 Further, Petitioner's arguments relying on documents not admitted to the record will
2 not be considered.

3 4 **V. DISCUSSION AND ANALYSIS**

5 The Board addresses Petitioner's issues in the following order:

- 6 A. "The EIS for the Subarea Plan and Development Regulations is Inconsistent with
7 the GMA and SEPA Because it Fails the Rule of Reason (*Remaining Issues 2,*
8 *10, and 11*)."¹⁸
9
10 B. "The Proposed Mitigation Measures in the Preferred Alternative are Inadequate
11 and, In Some Instances, Unattainable (*Remaining Issues 4 and 12*)."¹⁹
12
13 C. "The Subarea Plan and Development Regulations Violate the GMA by Directing
14 Urban Growth to an Area that Lacks Public Services and Overburdening Private
15 Property with Arbitrary and Discriminatory Action (*Remaining Issues 4, 5, 6, 7,*
16 *and 8*)."²⁰

17 **Issue A: Whether the EIS for the Subarea Plan and Development Regulations is**
18 **Inconsistent with the GMA and SEPA Because it Fails the Rule of Reason (*Issues 2,***
19 ***10, and 11*)**²¹

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21 **Applicable law:**

22 **RCW 36.70A.070(6)(a)(iii)(D)**
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24 ¹⁸ Petitioner's Prehearing Brief at 13.

25 ¹⁹ Petitioner's Prehearing Brief at 22.

26 ²⁰ Petitioner's Prehearing Brief at 27.

27 ²¹ **Issue 2:** Does Ordinance 2340 violate RCW 36.70A.130(2)(a)(i) because the cumulative impacts of the
28 Subarea Plan have not been addressed by appropriate environmental review under chapter 43.21C RCW?

29 **Issue 10:** Does adoption of the Ordinances violate RCW 43.21 C.030, .031, .060 and WAC 197-11-060, -400,
30 and -440 because the City failed to prepare an adequate EIS that addresses the probable significant adverse
31 environmental impacts resulting from traffic anticipated under the Subarea Plan and Development Regulations
32 on roads located within the Park?

Issue 11: Does adoption of the Ordinances violate RCW 43.21C.030 and .031 and WAC 197-11-060 because
the City failed to prepare an adequate EIS that addresses the cumulative impacts of traffic, including traffic
resulting from the WSDOT ETL Project and development of the ST Bus Base Project proposed within the
Park, together with traffic resulting from implementation of the Subarea Plan and the Development
Regulations?

- 1 (6) A transportation element that implements, and is consistent with, the land
2 use element.
3 (a) The transportation element shall include the following subelements:
4 (iii) Facilities and services needs, including:
5 (D) Specific actions and requirements for bringing into compliance locally
6 owned transportation facilities or services that are below an established
7 level of service standard.

8 **RCW 43.21C.440(1)(b)(i)**

- 9 (1) For purposes of this chapter, a planned action means one or more types of
10 development or redevelopment that meet the following criteria:
11 (b) In conjunction with, or to implement, a comprehensive plan or subarea plan
12 adopted under Chapter 36.70A RCW, or a fully contained community, a
13 master planned resort, a master planned development, or a phased
14 project, have had the significant impacts adequately addressed:
15 (i) in an environmental impact statement under the requirements of this
16 chapter. . .”

17 Petitioner alleges that the City’s traffic analysis underpinning the City’s later Final
18 Environmental Impact Statement (FEIS) contained “numerous flaws and glaring
19 omissions”.²² Specifically, the Petitioner argued that (1) the Washington State Department
20 of Transportation’s (WSDOT) traffic analysis is flawed because “the City’s EIS completely
21 omits that traffic conditions will already be at failing levels in the Park prior to addition of
22 growth and density from the Subarea Plan”,²³ (2) “the City did not adequately evaluate
23 transportation impacts on the private road network within the Park to determine whether
24 they were significant”,²⁴ (3) “the City improperly used the MXD Tool [mixed-use trip
25 generation tool] in multiple ways to artificially reduce the number of anticipated trips for the
26 Preferred Alternative”,²⁵ and (4) the FEIS resulting from these errors “fails the rule of reason
27 standard because it does not present decision makers with reasonable range of
28 alternatives, having set up a false choice in which only the Preferred Alternative is GMA
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30 ²² Petitioner’s Prehearing Brief at 19.

31 ²³ *Id.* at 14.

32 ²⁴ *Id.* at 15.

²⁵ *Id.* at 18.

1 compliant.”²⁶

2 The City argues that the FEIS thoroughly discussed and disclosed impacts for the
3 City Council to make an informed and reasoned decision.²⁷ First, the City argues that the
4 FEIS complies with the rule of reason because “Petitioner failed to provide any citation or
5 specific legal argument as to how the City allegedly violated the rule of reason” and “[t]he
6 City Council was provided with abundant information – including all of the information
7 provided by Petitioner – that allowed the Council to sufficiently evaluate the proposal.”²⁸
8 Next, the City argues that the City partnered with WSDOT to perform its analysis, that the
9 City’s traffic consultant Fehr & Peers found WSDOT’s analysis to be reasonable, and that
10 the Council was provided with both of those findings in addition to the Petitioner’s traffic
11 analysis by Transportation Engineering Northwest (TENW).²⁹ Further, the City argued that
12 vehicle-to-capacity (v/c) standards were appropriate because LOS standards only apply to
13 public roads and designated concurrency corridors, and Petitioner’s roads are private.³⁰ In
14 addition, the City argues that the City properly applied the MXD+ tool and that transportation
15 demand management (TDM) reductions were not duplicative.³¹ Finally, the City argues that
16 it properly analyzed alternatives and presented the no action alternative.
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20 **Board Discussion:**

21 At the outset, the Board reiterates that it lacks jurisdiction over the Planned Action
22 Ordinance (PAO) adopted in Ordinance 2142. The Board lacks jurisdiction to review a
23 planned action ordinance that does “not adopt or amend a subarea plan” or amend
24 development regulations.”³² RCW 36.70A.280 grants review authority only for a petition
25 alleging noncompliance with RCW 43.21C “as it relates to plans, development regulations,
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28 ²⁶ *Id.* at 21.

29 ²⁷ City’s Prehearing Brief at 12.

30 ²⁸ *Id.* at 14.

31 ²⁹ *Id.* at 17.

32 ³⁰ *Id.* at 18-19.

³¹ *Id.* at 21-22.

³² *Shoreline Preservation Society, et al. v. City of Shoreline*, GMHB No. 15-3-0002 (Order on Motions, September 10, 2015) at 4-5, 13.

1 or amendments.”³³ The PAO adopted in Ordinance 2141 was not a comprehensive plan or
2 a development regulation. Thus, only challenges to the comprehensive plan amendments
3 and subarea plan adopted in Ordinance 2140 and development regulations adopted in
4 Ordinance 2141 are before the Board. In particular, Petitioner may not collaterally attack
5 Ordinance 2142 by claiming the SEPA process to support Ordinance 2140 was insufficient
6 to support the PAO adopted in Ordinance 2142.
7

8 In determining the sufficiency of the FEIS, a threshold question is whether the City
9 was required to evaluate and verify the WSDOT analysis as Petitioner alleges. The Board
10 determines that it was not.

11 RCW 43.21C.034 Use of existing documents provides:

12 Lead agencies are authorized to use in whole or in part existing environmental
13 documents for new project or nonproject actions, if the documents adequately
14 address environmental considerations set forth in RCW 43.21C.030. The prior
15 proposal or action and the new proposal or action need not be identical, but
16 must have similar elements that provide a basis for comparing their
17 environmental consequences such as timing, types of impacts, alternatives, or
18 geography. The lead agency shall independently review the content of the
19 existing documents and determine that the information and analysis to be used
20 is relevant and adequate. If necessary, the lead agency may require additional
21 documentation to ensure that all environmental impacts have been adequately
22 addressed.

23 Thus, Petitioner argues that RCW 43.21C.034 required the City to determine that the
24 WSDOT info was “relevant and adequate”. The City responded at the Hearing on the Merits
25 (HOM) that it was “only obligated to coordinate” with WSDOT. While the Board agrees
26 Petitioner is quoting the statute correctly, it has long been held that jurisdictions are not
27 required to produce their own research. Further, the Board will not put itself in the position of
28 evaluating competing “expert” claims presented by Petitioner’s hired expert in the TENW
29 Report.

30 The Washington Courts have determined that resolving competing expert opinions is
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³³ *Id. at 4.*

1 a task for the lead agency, not the reviewing body.³⁴ The Board finds that the City had
2 before it the traffic analysis completed by WSDOT regarding its planned construction of the
3 Express Toll Lane (ETL) direct access ramp from I-405 to 17th Avenue SE (which it updated
4 by incorporating the updated land uses proposed in the Subarea), which the City's traffic
5 consultant, Fehr & Peers, found to be reasonable, and that the Council was provided with
6 both of those findings in addition to the Petitioner's traffic analysis prepared by TENW.³⁵
7 The City also analyzed the traffic impacts based on the changed land uses proposed in the
8 Subarea as documented in the Addendum to the Canyon Park Subarea Planned Action
9 Draft EIS (Addendum).³⁶ The City was within its authority to choose to rely on the analyses
10 of WSDOT and its traffic consultant and to incorporate this analysis into the FEIS. The
11 Board concludes that the FEIS gave the city council sufficient information to make a
12 reasoned decision.
13

14 The rule of reason requires that the EIS "present decision makers with a 'reasonably
15 thorough discussion of the significant aspects of the probable environmental consequences'
16 of the proposal so that the [city council] can make an informed decision and reasoned
17 choice among alternatives."³⁷
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19 **The Board finds** that the City's EIS and Addendum provided decision makers with a
20 reasonably thorough discussion of the significant aspects of the probable environmental
21 consequences of the Comprehensive Plan and Subarea Plan amendments.
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23 **The Board finds and concludes** that the Petitioner has not carried their burden to
24 show that the City failed to comply with GMA and SEPA requirements.
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26 **Issue B: Whether the Proposed Mitigation Measures in the Preferred Alternative are**

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29 ³⁴ *Davidson Serles, et al. v. City of Kirkland*, GMHB No. 09-3-0007c (FDO, October 5, 2009) at 19; *Des Moines*
30 *v. Puget Sound Reg'l Council*, 108 Wn. App. 836, 852 (1999).

31 ³⁵ City's Prehearing Brief at 16.

32 ³⁶ City's Prehearing Brief at 15-18; Exhibit E at 01011, Appendix D.

³⁷ *Seattle Coalition for Affordability, Livability, and Equity (SCALE) v. City of Seattle*, GMHB No. 19-3-0011c,
(FDO, Dec. 30, 2019) at 8.

1 **Inadequate or Unattainable (Issue 4 and 12)**³⁸

2 In Issue 4, Petitioner asserts that the Ordinances are noncompliant with the GMA
3 because the Subarea Plan and Development Regulations do not ensure transportation
4 facilities adequate to support that development will be available without decreasing LOS
5 below minimum standards. Issue 12 asserts that the City didn't identify adequate mitigation
6 measures, consistent with SEPA requirements.
7

8 Petitioner argues that the mitigation measures are inadequate because the traffic
9 analysis conducted by the City was "incomplete and incorrect."³⁹ The Petitioner also argues
10 that "several of the required mitigation measures" from the EIS and Subarea Plan are not
11 currently implementable because they rely on portions of the "private roadways that the City
12 does not currently own nor does the public have rights to use."⁴⁰ As a result, the Petitioner
13 argues that "[i]ndividual developments will be permitted to proceed without adequately
14 mitigating for the effects of their development on private roadways within the Park."⁴¹
15

16 The City counterargues that its mitigation measures are reasonable and that the LOS
17 standards apply to designated concurrency corridors, not to the Petitioner's private roads.⁴²
18 In addition, the City argues that it has "the power of condemnation, which may be used to
19 obtain property necessary for public transportation improvements" and that "reasonable and
20 attainable mitigation measures would include those within the City's authority to plan for...
21 ."⁴³ Finally, the City argues that "implementation of transportation improvements solely by
22 the City is not required for a thorough discussion of reasonable and attainable mitigation
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25 ³⁸ **Issue 4:** Do the Ordinances fail to comply with the requirements of RCW 36.70A.020(12), .070(3), and
26 .070(6) and Comprehensive Plan Goals and Policies, including TR-G 1, CF-G2, TR-P2, and TR-A 13, because
27 the Subarea Plan and Development Regulations do not ensure that transportation facilities necessary to
28 support development will be adequate to serve the development at the time the development is available for
29 occupancy and use without decreasing LOS below established minimum standards?

30 **Issue 12:** Does adoption of the Ordinances violate RCW 43.21C.030, .031, and .060 and WAC 197-11-060, -
31 164, -168, and -660 because the City failed to identify adequate mitigation measures necessary to address
32 traffic impacts of the development authorized by the Ordinances?

³⁹ Petitioner's Prehearing Brief at 22.

⁴⁰ *Id.* at 24.

⁴¹ *Id.* at 27.

⁴² City's Prehearing Brief at 27.

⁴³ *Id.* at 30.

1 measures".⁴⁴

2 **Board Discussion**

3 The Board has already addressed the threshold question of the sufficiency of the
4 City's analysis of transportation impacts by reliance on the WSDOT work.

5 The essence of the conflict here is the City's contention that it only has authority to
6 identify level of service standards for public roads versus the Petitioner's contention that
7 because the City is expecting private roads to carry a large portion of increased road trips
8 that result from assigning the majority of the development density to the Park, it must
9 evaluate and mitigate the impacts of the increased trips on the private roads.

10 While the Petitioner makes several conclusory statements about what the GMA
11 requires, the only GMA section referenced in its legal argument is GMA Planning Goal 12:

12 Public Facilities and services. Ensure that those public facilities and services
13 necessary to support development shall be adequate to serve the
14 development at the time the development is available for occupancy and use
15 without decreasing current service levels below locally established minimum
16 standards.

17 As pertains to the assertion that the City has violated SEPA in adopting these
18 ordinances, the only reference is to RCW 43.21.440(1)(b)(i), which is a definitional section
19 titled "Planned action – Defined – Authority of a county, city or town – Community
20 meetings." A footnote citation to WAC 197-11-164(1)(b)⁴⁵ is another definitional section.

21 Petitioner argues that the Ordinances constitute a violation of this section, because
22 the mitigation in the FEIS is, in their view, wholly inadequate to mitigate the impacts on the
23 private roadways.⁴⁶ But the section cited simply is not relevant to the argument being
24 made.

25 The core of much of the argument here is that the City's assumptions and handling of
26 private roads in the FEIS leaves unresolved the issue of possible future dedication of the
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31 ⁴⁴ *Id.* at 31.

32 ⁴⁵ *Id.* at 26, n.124.

⁴⁶ *Id.* at 27.

1 private roads to the City for public use. Both Petitioner and City acknowledge that
2 negotiations about the use of the private roads and transfer to the City have occurred, but
3 there is no agreement.

4 Petitioner has provided no statutory requirement that the City must take ownership of
5 private roads at this time. Planning under the GMA and SEPA, including subarea plans, is
6 by definition anticipatory. The plans describe and anticipate growth scenarios, identify
7 impacts and describe a means of accommodating growth with better outcomes than would
8 have occurred without planning.
9

10 It is well settled that the GMA “is primarily prospective in nature and is premised upon
11 the recognition that influencing future planning decisions is more realistic than changing the
12 decisions of bygone eras.” *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 127, 118 P.3d
13 322 (2005).
14

15 WAC 197-11-440(6)(a) requires that an EIS “discuss reasonable mitigation measures
16 that would significantly mitigate” identified impacts. Petitioner argues that what the EIS
17 provides is not sufficient because it does not address their particular concerns with
18 mitigation measures agreeable to them. There is no requirement that an EIS’s mitigation
19 discussion address every conceivable adverse impact or mitigation, just that the discussion
20 be reasonable, under the circumstances. In *Cascade Bicycle*, the court found that “PSRC
21 sufficiently addresses reasonable mitigation measures because it not only discusses
22 general actions for all alternatives but also acknowledges that further actions may be
23 necessary to reduce the environmental impacts it discusses and points to specific agencies
24 that have such authority.”⁴⁷
25

26 The City points out, properly, that it isn’t reasonable for the City to adopt LOS
27 standards for non-corridor privately owned roads.⁴⁸ Case law supports the City’s contention
28 that the EIS is intended to facilitate decision making, not to evaluate every scenario or
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32 ⁴⁷ *Cascade Bicycle Club v. Puget Sound Reg’l Council*, 175 Wn. App. 494 (2013) at 515.

⁴⁸ City’s Prehearing Brief at 28.

1 provide worst-case analysis.⁴⁹

2 In *Glasser v. City of Seattle*, the argument was largely substantive: that a
3 programmatic action in adaptive management would not actually mitigate for adverse
4 effects. "SEPA is primarily a procedural statute that requires the disclosure of environmental
5 information. 'SEPA does not demand a particular substantive result in government decision
6 making; rather, it ensures that environmental values are given appropriate consideration.'"⁵⁰

7 WAC 197-11-440(6)(c)(iii) and (iv) describes the affected environment, significant
8 impacts and mitigation measures to be addressed in an EIS and while requiring clear
9 indication of mitigation measures that could be implemented or might be required, also
10 anticipates discussion of "technical feasibility and economic practicability if there is concern
11 about whether a mitigation measure is capable of being accomplished."

12 The record shows that the FEIS and Addendum included discussion of impacts and
13 mitigation within the Business Center.⁵¹ Decision makers had a reasonable amount of
14 information on which to base their decision, with timing and details left for later
15 development.

16 Petitioner offers no proof of any requirement that a City own real property for public
17 facilities in order to discuss their use in reasonable and attainable mitigation measures.
18 None of the statutes cited by Petitioner as violations, includes an ownership element or
19 requirement. The City has the authority to condemn property necessary for public
20 transportation improvements,⁵² and there are multiple examples of local jurisdictions
21 exercising that authority when necessary. RCW 36.70A.070(6) sets out the requirement for
22 a multi-year financing plan for implementation of the comprehensive plan, including
23 discussion of what happens if funding falls short.

24 The development anticipated in the adopted Ordinances may or may not occur. The
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30 ⁴⁹ *Reclamation Co. v. Biornsen*, 125 Wn. App. 432, 442, n. 9, 105 P.3d 94 (2005), *Glasser v. City of Seattle*,
31 139 Wn. App. 728, 741, 162 P.3d 1134 (2007).

32 ⁵⁰ *Glasser*, at 742.

⁵¹ Exhibit E at 01077.

⁵² Chapter 8.12 RCW.

1 intentions and interests of real property owners and the regulations of the City and other
2 permitting entities will determine if and when the vision presented in the Subarea Plan is
3 realized. RCW 36.70A.070(6)(b) does not require that improvements be in place at the time
4 of adoption of planning documents and development regulations such as the challenged
5 Ordinances here. Concurrent with development is defined as:

6
7 For the purposes of this subsection (6), "concurrent with the development"
8 means that improvements or strategies are in place at the time of
9 development, or that a financial commitment is in place to complete the
10 improvements or strategies within six years. If the collection of impact fees is
11 delayed under RCW 82.02.050(3), the six-year period required by this
12 subsection (6)(b) must begin after full payment of all impact fees is due to the
13 county or city.

14 Petitioner's reply to the City's response continues to assume that mitigation must be
15 presently implementable, asserting that the structure of the Park ownership and functioning
16 supports their assertion that the mitigation measures are not "reasonably capable of being
17 accomplished."⁵³ Those are matters to be discussed by property owners, the association
18 and the City when considering development under the Subarea Plan; the ease or difficulty
19 of those discussions is not a basis for evaluating SEPA or GMA compliance.

20 **The Board finds and concludes** that the Petitioner has failed to meet its burden of
21 proof that the City violated any requirement of the GMA or SEPA described in Issues 4 and
22 12.

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24 **Issue C: The Subarea Plan and Development Regulations Violate the GMA by**
25 **Directing Urban Growth to an Area that Lacks Public Services and Overburdening**
26 **Private Property with Arbitrary and Discriminatory Action (Issues 4, 5, 6, 7, and 8).**⁵⁴
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28 ⁵³ Petitioner's Reply to City of Bothell's Prehearing Brief at 7.

29 ⁵⁴ **Issue 4:** Do the Ordinances fail to comply with the requirements of RCW 36.70A.020(12), .070(3), and
30 .070(6) and Comprehensive Plan Goals and Policies, including TR-G 1, CF-G2, TR-P2, and TR-A 13, because
31 the Subarea Plan and Development Regulations do not ensure that transportation facilities necessary to
32 support development will be adequate to serve the development at the time the development is available for
occupancy and use without decreasing LOS below established minimum standards?

Issue 5: Do the Ordinances fail to comply with the requirements of RCW 36.70A.020(1) and .110(3) and
Comprehensive Plan Goal LU-G4, because the Subarea Plan and Development Regulations fail to plan for

1 In this issue, Petitioner argues that the City cannot meet its requirement to have
2 adequate public facilities and services because the City's "regulations heavily rely on the
3 private road network within the Park. . ." to handle the impending growth.⁵⁵ As a result,
4 Petitioner argues that the private roads will be overburdened and will result in "the City's
5 arbitrary and discriminatory treatment of Petitioner."⁵⁶ As examples of this arbitrary and
6 discriminatory treatment, the Petitioner argues that the City is putting the burden of handling
7 the impending growth and increasing police presence on Petitioner, despite the lack of
8 adopted police LOS standards for issues of public safety on the private road network.⁵⁷
9 Further, Petitioner asserts that, despite years of working with the City to accept dedication of
10 its private road network, it has not met with success. It argues that "[i]t is unfair and contrary
11 to Washington's collaborative planning policies to require a private entity to 'voluntarily'
12 finance and complete significant infrastructure projects that will result in inefficient and
13 unattractive road improvements and that will fail to mitigate under-analyzed traffic
14 impacts."⁵⁸
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17 In response, the City argues that the City has not acted in an arbitrary and
18 discriminatory manner and that the City has not impacted Petitioner's right to possess,
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22 urban development in areas where adequate public transportation facilities and services exist or can be
provided in an efficient manner?

23 **Issue 6:** Do the Ordinances fail to comply with the requirements of RCW 36.70A.020(6) because the Subarea
24 Plan and Development Regulations fail to protect private property (specifically the roads owned by Petitioners)
from arbitrary actions?

25 **Issue 7:** Do the Ordinances fail to comply with the terms of RCW 36.70A.020(5) and Comprehensive Plan
26 Goal ED-G2, which provide that the City shall encourage economic development within "the capacities of the
area's natural resources, public services, and public facilities," when the Subarea Plan and Development
27 Regulations rely on the Park's private roadway system to support the City's desired economic development?

28 **Issue 8:** Do the Ordinances fail to comply with RCW 36.70A.070 (preamble), WAC 365-196-500, and
29 Comprehensive Plan Policy LU-P15 due to inconsistencies with Comprehensive Plan Policy ED-P25, which
30 requires transforming the Canyon Park Regional Activity Center into a more vital and sustainable mixed-use
Center that will make worse an already failing transportation system?

31 ⁵⁵ Petitioner's Prehearing Brief at 27.

32 ⁵⁶ *Id.* at 28.

⁵⁷ *Id.* at 29.

⁵⁸ *Id.* at 29.

1 exclude, or alienate on its private roads.⁵⁹ In addition, the City argues that it did not single
2 out Petitioner and that “the City has not inappropriately shifted policing onto Petitioner or
3 other private landowners.”⁶⁰ The City also notes that the City and WSDOT have
4 condemnation authority.

5 **Applicable law:**

6 **RCW 36.70A.020 begins with a preamble:**

7
8 The following goals are adopted to guide the development and adoption of
9 comprehensive plans and development regulations of those counties and
10 cities that are required or choose to plan under RCW 36.70A.040. The
11 following goals are not listed in order of priority and shall be used exclusively
12 for the purpose of guiding the development of comprehensive plans and
development regulations.

13 **RCW 36.70A.020(6)** provides that “[t]he property rights of landowners shall be protected
14 from arbitrary and discriminatory actions.

15 **RCW 36.70A.110(3)** provides:

16 Urban growth should be located first in areas already characterized by urban
17 growth that have adequate existing public facility and service capacities to
18 serve such development, second in areas already characterized by urban
19 growth that will be served adequately by a combination of both existing public
20 facilities and services and any additional needed public facilities and services
21 that are provided by either public or private sources, and third in the remaining
portions of the urban growth areas.

22 **Board Discussion**

23
24 At the heart of the controversy here is the issue of the private ownership of 17th and a
25 segment of 20th that will act as connectors between the new off-ramp. Petitioner and the
26 City have long been in negotiations over whether the CPBCOA will need to pay for local
27 road improvements before the City will adopt them⁶¹ or whether the City or state will
28 exercise a right of condemnation for public use.

29
30

⁵⁹ City's Prehearing Brief at 34.

31 ⁶⁰ *Id.* at 35.

32 ⁶¹ And CPBCOA's contention that the City will deny permits for development to force the private improvement
of public roads for, arguably, public throughput.

1 While, as noted above, Petitioner claims “[i]t is unfair and contrary to Washington’s
2 collaborative planning policies to require a private entity to ‘voluntarily’ finance and complete
3 significant infrastructure projects that will result in inefficient and unattractive road
4 improvements and that will fail to mitigate under-analyzed traffic impacts”, the statute that
5 Petitioner relies upon and which Petitioner alleges the City is acting contrary to. Petitioner
6 notes that “[i]t is in the public interest that citizens, communities, local governments, and the
7 private sector cooperate and coordinate with one another in comprehensive land use
8 planning.”⁶² This hortatory language contained in a broad legislative finding in support of
9 “cooperation and coordination” is not a clear mandate, nor does it suggest that local
10 government may not require development to contribute to the cost of needed infrastructure.
11

12 With regard to the alleged violation of RCW 36.70A.020(6), GMA’s property rights
13 goal, which protects landowners from arbitrary and discriminatory actions, the Board has
14 previously set forth the following definitions for these terms:
15

16 *Arbitrary:* an ill-conceived, unreasoned, or ill-considered action.

17 *Discriminatory:* to single out a particular person or class of persons for different
18 treatment without a rational basis upon which to make the segregation.⁶³

19 As the City points out: To prevail on a challenge based on Goal 6, a petitioner “must
20 prove that the action taken by a local jurisdiction has impacted a legally recognized right
21 and that the action is *both* arbitrary *and* discriminatory. *Citizens Protecting Critical Areas &*
22 *Olympic Stewardship Foundation v. Jefferson County*, WWGMHB Case No. 08-2-0029c,
23 FDO (Nov. 19, 2008) at 43 (emphasis in original).”⁶⁴
24

25 Government action is not arbitrary unless it is completely baseless. *State v. Ford*, 110
26 Wn.2d 827, 830-31, 755 P.2d 806, 808 (1988) (holding an error in judgment is not arbitrary,
27 the action essentially must be in disregard of the facts and circumstances involved).
28

29 “The term discriminatory involves actions that single out a particular person or class
30

31 ⁶² RCW 36.70A.010.

32 ⁶³ *Pt. Roberts Registered Voters Assoc. v. Whatcom County*, WWGMHB No. 00-2-0052 (FDO, April 6, 2001)
at 5 (citing *Achen v. Clark County*, WWGMHB No. 95-2-0067 (FDO, Sept. 20, 1995)).

⁶⁴ City’s Prehearing Brief at 33.

1 of persons for different treatment without a rational basis upon which to make the
2 segregation.” *Abenroth, et al v. Skagit County*, WWGMHB No. 97-2-0060c (FDO, Jul. 22,
3 1998) at 55.

4 Requiring a developer to improve private roads as a condition precedent to accepting
5 them as public right-of-way cannot be said to be either arbitrary or discriminatory. As the
6 City notes, the Petitioner is not being asked to make improvements that are not tied to the
7 development of its property. Further, the City points out that Petitioner has not cited to a
8 single specific requirement that has been placed on it in violation of the GMA.
9

10 While Petitioner argues that the Subarea Plan inappropriately shifts the responsibility
11 of policing onto it, by supposedly requiring on-site private security agreements to address
12 public safety issues, it does not demonstrate that such a policy violates a provision of the
13 GMA. Instead, Petitioner argues that this is further evidence of the City singling out private
14 owners such as itself to mitigate impacts.
15

16 In fact, as noted in response to a public comment on this issue when in front of the
17 Planning Commission, not surprisingly, “Bothell Police respond to calls for service
18 throughout the city regardless of street ownership.”⁶⁵ Therefore, the Board does not find that
19 Petitioner has demonstrated that it has been treated in an arbitrary or discriminatory
20 manner.
21

22 Petitioner states that “the City does not have a police LOS standard for issues of
23 public safety on the private road network”⁶⁶ yet it fails to demonstrate such a requirement
24 exists in the GMA. It does not.

25 **The Board finds** Petitioner has not demonstrated the City has failed to comply with
26 its comprehensive plan with regard to LOS standards.

27 Finally, with regard to Petitioner’s argument that the City violated GMA’s “instruction”
28 for cities to direct urban growth to areas with existing facilities and infrastructure able to
29 service projected growth and acted in disregard of the facts and discriminated against
30

31
32 ⁶⁵ Exhibit 47 at 02444.

⁶⁶ Petitioner’s Prehearing Brief at 29.

1 Petitioner contrary to the GMA Goals 6 and 12 by directing significant urban growth into the
2 Park.⁶⁷ RCW 36.70A.110(3) provides that “[u]rban growth should be located first in areas
3 already characterized by urban growth that have adequate existing public facility and
4 service capacities to serve such development.” However, it also provides that growth may
5 be directed “second in areas already characterized by urban growth that will be served
6 adequately by a combination of both existing public facilities and services and any additional
7 needed public facilities and services that are provided by either public or private sources”.
8 In the present case, the Subarea Plan seeks to “improve connectivity and relieve stress on
9 the major corridors and three entry points to the [Business Center].”⁶⁸ It also prioritizes
10 transit⁶⁹ and identifies numerous transportation projects (vehicular, non-vehicular, and
11 transit) to be completed by the City, other government agencies, and private owners that will
12 help relieve traffic in this area.⁷⁰ As the City points out, its concurrency regulations will also
13 ensure that development occurs with adequate facilities at the time or within six years.⁷¹

14
15 Because Petitioner fails to cite, much less argue, the statutory basis for those alleged
16 violations of the GMA raised in Issues 7 and 8, the Board finds that those issues have been
17 abandoned.

18
19 **The Board finds** that Petitioner has not shown that the City’s action will direct urban
20 growth to an area that that lacks adequate public infrastructure.

21 **The Board finds** that Petitioner has not shown that the City’s action was arbitrary
22 and discriminatory with respect to private property.

23
24 **The Board finds and concludes** that the Petitioner has failed to meet its burden of
25 proof that the City violated any requirement of the GMA described in Issues 4, 5 or 6. Issues
26 7 and 8 were abandoned.

27
28
29
30 ⁶⁷ Petitioner’s Brief at 28.

31 ⁶⁸ Exhibit A at 00114.

32 ⁶⁹ *Id.* at 00121

⁷⁰ *Id.* at 00116-00128.

⁷¹ BMC Title 17.

1 **VI. CONCLUSION AND ORDER**

2 Based upon review of the petition, the briefs and exhibits submitted by the parties,
3 the GMA, prior Board orders and case law, having considered the arguments of the parties,
4 and having deliberated on the matter, the Board finds, concludes, and orders as follows:

- 5
- 6 • The City's EIS and Addendum provided decision makers with a reasonably
7 thorough discussion of the significant aspects of the probable environmental
8 consequences of the Comprehensive Plan and Subarea Plan amendments.
 - 9 • Petitioner has not demonstrated the City has failed to comply with its
10 comprehensive plan with regard to LOS standards.
 - 11 • Petitioner has not shown that the City's action will direct urban growth to an
12 area that that lacks adequate public infrastructure.
 - 13 • Petitioner has not shown that the City's action was arbitrary and discriminatory
14 with respect to private property.
 - 15 • Petitioner has not shown that the challenged actions failed to comply with
16 GMA and SEPA requirements.
 - 17 • Case No. 21-3-0006 is closed.
- 18
- 19

20 SO ORDERED this 16th day of August 2021.

21

22 _____
23 Cheryl Pflug, Board Member

24 _____
25 Deb Eddy, Board Member

26 _____
27 James J. McNamara, Board Member

28
29 **Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to**
30 **RCW 36.70A.300. A motion for reconsideration must be filed with the Board and served on all parties**
31 **within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved**
32 **by a final decision of the Board may appeal the decision to Superior Court within thirty days as**
provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.

Appendix A: Procedural matters

On February 16, 2021 Canyon Park Business Center Owners' Association (Petitioner) filed a petition for review, which was assigned Case No. 21-3-0006.

The presiding officer held a prehearing conference on March 5, 2021. On April 19, 2021, the Owners' Association filed a motion to supplement the record and the City responded in opposition on April 29, 2021. The motion was granted in part and denied in part.⁷²

The Briefs and exhibits of the parties filed as follows:

- Petitioner's Prehearing Brief filed on May 17, 2021.
- Response Brief filed on June 7, 2021.
- Petitioner's Reply Brief filed on June 14, 2021

Hearing on the Merits

The board panel convened a hearing on the merits June 17, 2021. The hearing afforded each party the opportunity to emphasize the most important facts and arguments relevant to its case. Board members asked questions to understand the history of the ordinances, the facts in the case, and the legal arguments of the parties.

⁷² Order on Motion to Supplement the Record (May 4, 2021).

Appendix B: Legal Issues

Per the Prehearing Order, legal Issues in this case were as follows:

1. Does adoption of the Ordinances violate the requirements of RCW 36.70A.020(1 l) and .140, because the City did not provide for early and continuous public participation, including sufficient opportunity for written comments, provision for open discussion, and consideration of and response to public comments?
2. Does Ordinance 2340 violate RCW 36.70A. 130(2)(a)(i) because the cumulative impacts of the Subarea Plan have not been addressed by appropriate environmental review under chapter 43.21C RCW?
3. Does adoption of Ordinance 2340 fail to be guided by coordinated planning requirements under RCW 36.70A.010, .020(11), and .210(1); Snohomish County Countywide Planning Policies, including TR-1, TR-2, and TR-IO; and Comprehensive Plan Policies, including TR-P I and TR-A 10, as it pertains to planning by Washington State Department of Transportation ("WSDOT") to develop an Express Toll Lane off-ramp ("ETL Project") and planning by Sound Transit ("ST") pertaining to development of a bus maintenance facility ("Bus Base Project") in the Canyon Park Subarea?
4. Do the Ordinances fail to comply with the requirements of RCW 36.70A.020(12), .070(3), and .070(6) and Comprehensive Plan Goals and Policies, including TR-G 1, CF-G2, TR-P2, and TR-A 13, because the Subarea Plan and Development Regulations do not ensure that transportation facilities necessary to support development will be adequate to serve the development at the time the development is available for occupancy and use without decreasing LOS below established minimum standards?
5. Do the Ordinances fail to comply with the requirements of RCW 36.70A.020(1) and .110(3) and Comprehensive Plan Goal LU-G4, because the Subarea Plan and Development Regulations fail to plan for urban development in areas where adequate public transportation facilities and services exist or can be provided in an efficient manner?
6. Do the Ordinances fail to comply with the requirements of RCW 36.70A.020(6) because the Subarea Plan and Development Regulations fail to protect private property (specifically the roads owned by Petitioners) from arbitrary actions?
7. Do the Ordinances fail to comply with the terms of RCW 36.70A.020(5) and

1 Comprehensive Plan Goal ED-G2, which provide that the City shall encourage
2 economic development within "the capacities of the area's natural resources,
3 public services, and public facilities," when the Subarea Plan and
4 Development Regulations rely on the Park's private roadway system to
5 support the City's desired economic development?

6 8. Do the Ordinances fail to comply with RCW 36.70A.070 (preamble), WAC
7 365-196-500, and Comprehensive Plan Policy LU-P15 due to inconsistencies
8 with Comprehensive Plan Policy ED-P25, which requires transforming the
9 Canyon Park Regional Activity Center into a more vital and sustainable mixed-
10 use urban center, whereas the Ordinances mandate additional development
11 on the Canyon Park Regional Activity Center that will make worse and already
12 failing transportation system?

13 9. Do the Ordinances fail to comply with RCW 36.70A.070 (preamble), WAC
14 365-196-500, and Comprehensive Plan Policy LU-P15 due to inconsistencies
15 with Comprehensive Plan Goal TR-G8, which requires prioritization of
16 transportation investments to support the Canyon Park Regional Growth
17 Center, whereas the Ordinances generate additional development in the
18 Canyon Park Regional Growth Center without ensuring adequate
19 transportation improvements to serve that additional development?

20 10. Does adoption of the Ordinances violate RCW 43 .21 C.030, .031, .060 and
21 WAC 197-11-060, -400, and -440 because the City failed to prepare an
22 adequate EIS that addresses the probable significant adverse environmental
23 impacts resulting from traffic anticipated under the Subarea Plan and
24 Development Regulations on roads located within the Park?

25 11. Does adoption of the Ordinances violate RCW 43.21C.030 and .031 and
26 WAC 197-11-060 because the City failed to prepare an adequate EIS that
27 addresses the cumulative impacts of traffic, including traffic resulting from the
28 WSDOT ETL Project and development of the ST Bus Base Project proposed
29 within the Park, together with traffic resulting from implementation of the
30 Subarea Plan and the Development Regulations?

31 12. Does adoption of the Ordinances violate RCW 43.21C.030, .031, and .060
32 and WAC 197-11-060, -164, -168, and -660 because the City failed to identify
adequate mitigation measures necessary to address traffic impacts of the
development authorized by the Ordinances?